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New West Federal Savings and Loan Association v. John L. Margetts : Brief of Appellant

Utah Court of Appeals

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**IN THE
COURT OF APPEALS
OF THE
STATE OF UTAH**

NEW WEST FEDERAL SAVINGS AND LOAN ASSOCIATION, a California corporation, successor-in-interest to AMERICAN SAVINGS AND LOAN ASSOCIATION, a California corporation, Plaintiff-Appellee, vs. JOHN L. MARGETTS, Defendant-Appellant.	Case No. 900409-CA

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third Judicial District Court of Salt Lake County
Honorable Kenneth Rigtrup, Judge

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Argument Priority: (16) Any matter not included within other categories.

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STATEMENT OF JURISDICTION

Jurisdiction is conferred on this court by §78-2a-3(j), U.C.A. This is an appeal from a final judgment, dated April 23, 1990, of the Third Judicial District Court of Salt Lake County, State of Utah. Notice of Appeal was filed May 23, 1990. On July 31, 1990, this case was transferred to the Court of Appeals by the Supreme Court pursuant to §78-2-2(4), U.C.A.

ISSUES PRESENTED FOR REVIEW

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NEW WEST'S ATTORNEYS, FABIAN AND CLENDENIN, SHOULD HAVE BEEN DISQUALIFIED BECAUSE OF THEIR FORMER REPRESENTATION OF MARGETTS AND HIS FAMILY AND BUSINESS ENTITIES.

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POINT VIII

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STANDARD OF APPELLATE REVIEW

1. The issue of disqualification of attorneys involves mixed questions of fact and law which does not require deference to the findings of the lower court. The standard of review of the disqualification issue has been held to be the abuse of discretion standard, Margulies v. Upchurch, 696 P.2d 1195, 1200 (Utah 1985), but some courts review disqualification without deference to the trial court because the ethical rules governing the legal profession involve substantial legal questions. Unified Sewarage Agency v. Jelco Inc., 646 F.2d 1339, 1344 n.3 (9th Cir. 1981)

2. The issue of construing several agreements together as one transaction is a question of law and no deference to the trial court is required. Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357, 1358 (Utah App. 1987).

3. The remaining issues involve mixed questions of fact and law which "do not require the deference due to findings on questions of pure fact." Margulies v. Upchurch, supra, at 1200. However, to the extent that findings of fact had to be made to determine the facts of agency (Point III) fraud, negligent misrepresentation, duress, mistake, unconscionability (Point V), the existence of a rental agreement (Point VI), benefits conferred (Point VI), and reasonableness of attorney's fees (Point VIII), the lower court's findings are to be upheld if there is substantial evidence to support them. But, the legal conclusions resulting from the facts and the interpretations of the agreements and of the statutes are questions of law which are reviewed only for correctness with no deference to the lower court's determination. Bonham v. Morgan, 788 P.2d 497 (Utah 1989); Madsen v. Borthick, 769 P.2d (Utah 1988); Asay v. Watkins, 751 P.2d 1135 (Utah 1988); Nielson v. Nielson, 780 P.2d 1264 (Utah App. 1989). In particular, the issues of whether New West is jointly bound with Terrace Falls (Point II), bound by the acts of its agent (Point III), bound as the successor of Terrace Falls (Point IV), or bound by ratification and estoppel (Point III), whether the facts found constitute fraud, negligent misrepresentation, duress, mistake, unconscionability (Point V), and interpretation of or compliance with any agreement, rule or statute (Points I, II, III, IV, VII and VIII) are all questions of law to be reviewed for correctness only. In addition, the issues of prejudgment interest (Point IX), attorney's fees (Point VIII), and whether it is inequitable to retain benefits conferred (Point VI) are for the court to decide and are not trier-of-fact questions. They are to be reviewed for correctness only.

STATUTES AND RULES TO BE INTERPRETED

Utah Code Annotated

§78-36-3 Unlawful detainer by tenant for term less than life.

(1) A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

(a) when he continues in possession, in person or by subtenant, of the property or any part of it, after the expiration of the specified term or period for which it is let to him, which specified term or period, whether established by express or implied contract, or whether written or parol, shall be terminated without notice at the expiration of the specified term or period;

(b) when, having leased real property for an indefinite time with monthly or other periodic rent reserved:

(i) he continues in possession of it in person or by subtenant after the end of any month or period, in cases where the owner, his designated agent, or any successor in estate of the owner, 15 days or more prior to the end of that month or period, has served notice requiring him to quit the premises at the expiration of that month or period; or

(ii) in cases of tenancies at will, where he remains in possession of the premises after the expiration of a notice of not less than five days;

(c) when he continues in possession in person or by subtenant, after default in the payment of any rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, has remained uncomplied with for a period of three days after service, which notice may be served at any time after the rent becomes due;

(d) when he assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste on the premises, or when he sets up or carries on any unlawful business on or in the premises, or when he suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after service upon him of a three days' notice to quit; or

(e) when he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned, and after notice in writing requiring in the alternative the performance of the conditions or covenant or the surrender of the property,

served upon him and upon any subtenant in actual occupation of the premises remains uncomplied with for three days after service. Within three days after the service of the notice, the tenant, any subtenant in actual occupation of the premises, any mortgagee of the term, or other person interested in its continuance may perform the condition or covenant and thereby save the lease from forfeiture, except that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, then no notice need be given.

§78-36-6 Notice to quit -- How served.

The notices required by the preceding sections may be served:

(1) by delivering a copy to the tenant personally;

(2) by sending a copy through registered or certified mail addressed to the tenant at his place of residence;

(3) if he is absent from his lace of residence or from his usual place of business, by leaving a copy with a person of suitable age and discretion at either place and mailing a copy to the tenant at the address of his place of residence or place of business; or

(4) if a person of suitable age or discretion cannot be found at the place of residence, then by affixing a copy in a conspicuous place on the leased property. Service upon a subtenant may be made in the same manner.

§78-36-10 Judgment for restitution, damages, and rent -- Immediate enforcement -- Treble damages.

(1) A judgment may be entered upon the merits or upon default. A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises. If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement.

(2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:

(a) forcible entry;

(b) forcible or unlawful detainer;

(c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial; and

(d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2) (a) through (2)(c), and for reasonable attorney's fees, if they are provided for in the lease or agreement.

(4) If the proceeding is for unlawful detainer after default in the payment of the rent, execution upon the judgment shall be issued immediately after the entry of the judgment. In all cases, the judgment may be issued and enforced immediately.

Rules of Professional Conduct

Rule 1.9. Conflict of Interest: Former Client.

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially factually related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Rule 1.10. Imputed Disqualification: General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may no knowingly represent a person in the same or a substantially factually related matter in which that lawyer, or a firm with which the lawyer has associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

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NEW WEST FEDERAL SAVINGS AND LOAN ASSOCIATION, a California corporation, successor-in-interest to AMERICAN SAVINGS AND LOAN ASSOCIATION, a California corporation, Plaintiff-Appellee, vs. JOHN L. MARGETTS, Defendant-Appellant.	Case No. 900409-CA

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Nature of the Case

Plaintiff New West Federal Savings and Loan Association (hereinafter referred to as "New West") filed a Complaint against defendant John L. Margetts (hereinafter referred to as "Margetts") to enforce an agreement to buy a condominium unit from New West or, in the alternative, to obtain possession of the property and a judgment for the rental value of the property. Margetts' Answer asserted that he was coerced into signing the purchase agreement by fraud and duress and the simultaneous signing of another agreement which would have given him credit for the full amount of the

purchase price for the condominium unit and also into giving up a trust deed lien against the whole condominium project. He counterclaimed for a deed to the unit, for offsets for expenses paid to complete the unit, for the value of sales of other units made by Margetts for New West and for the value of Margetts' security services in the project.

Disposition in the Lower Court

After trial the lower court entered judgment in favor of New West in the amount of $32,031.00 for rental of the unit, prejudgment interest and treble damages, plus attorney's fees of $20,515.00 and terminating any interest of Margetts in the condominium and granting possession thereof to New West.

Statement of Facts

1. On October 3, 1980, Margetts entered into an Exchange Agreement with Garden Falls Condominiums, the predecessor in interest of New West, by which Margetts agreed to exchange a condominium in Park City for a condominium in what later became known as Terrace Falls Condominiums at Third Avenue and "A" Street in Salt Lake City. Because the Terrace Falls Condominiums had not yet been built, Margetts was given a Trust Deed on the Terrace Falls Condominiums as security for conveyance to him of the completed condominium.

2. On December 9, 1981, Garden Falls Condominiums persuaded Margetts to enter into a new agreement, a Condominium Acquisition Agreement, with Terrace Falls Condominiums, a limited partnership, the new name for Garden Falls Condominiums, by which Margetts would receive credit towards the purchase of a designated condominium unit in the project

of $200,000.00 plus 15% thereof per year from December 9, 1981 until the date of closing in return for a subordination of his Trust Deed against the project to construction financing (Exh.2). A new trust deed in favor of Margetts was recorded December 22, 1981 (Exh.3).

3. On September 6, 1984, Gerald Snow, an attorney, called Margett's attorney, requesting Margetts to meet with Lee Stevens of American Savings & Loan Association, the construction lender on the Terrace Falls Condominiums, on September 12, 1984 (R.539, p.292). This was followed by a letter from Gerald Snow, dated September 7, 1984, confirming this request (Exh.5).

4. At the meeting on September 12, 1984, Mr. Snow and Mr. Stevens of American Savings and Loan told Margetts that Terrace Falls Condominiums and its principals were insolvent and that American Savings and Loan was going to foreclose its first trust deed against the Terrace Falls Condominiums and cut off all of Margetts' rights therein unless it could obtain a release of all junior liens against the project, including Margetts' trust deed. Mr. Snow and Mr. Stevens then offered Mr. Margetts $20,000.00 for a release of his trust deed against the condominium project. Margetts refused this offer and left the meeting. Mr. Snow called later to increase the offer to $50,000.00 or a credit of $150,000.00 towards the purchase of a condominium (R.539, pp.203-4; R.538, pp.61-63).

5. Mr. Snow prepared and delivered several agreements (Condominium Purchase Agreement, Settlement Agreement, General Release, and Request for Reconveyance), giving Margetts the $150,000.00 credit and made several requests of Margetts and his attorney over the next

two months that the agreements be signed and returned because all other lien holders had settled and Margetts was holding up the whole settlement (R.539, pp.268-274, 206-207; R.538, p.135). Margetts refused to do so.

6. Because Margetts was leaving town for two weeks and Mr. Snow was anxious to conclude a settlement with Margetts, Mr. Snow arranged a meeting with margetts, without his attorney, on November 14, 1984. Mr. Margetts again refused to sign the agreements (R.538, pp. 125-6; R.539, p.210). Mr. Snow asked him to return that afternoon at which time Mr. Snow thought he could present a better deal to him (R.539, p.211).

7. Margetts met with Mr. Snow again that afternoon at which time he was presented with an additional agreement (Exh.10 and 16) which would give him an additional credit towards the purchase of the designated condominium unit of 20% of the proceeds of the sale of other units in the condominium project as an inducement to get him to sign the previously prepared Condominium Purchase Agreement, Settlement Agreement, General Release, and Request For Reconveyance. Mr. Snow assured Margetts that the other agreements would not be delivered until this twenty percent agreement was signed and that American Savings would be bound by that agreement. Mr. Margetts thereupon signed all the agreements (R.538, pp.139-140; R.539, pp.212-214). He further told Margetts that he would get what he wanted by that agreement, that only seven condominiums had to be sold to completely pay for his condominium, and that American Savings did not have to sign the agreement to be bound by it because American would be Terrace Falls Condominiums.

8. Margetts' trust deed in the project was reconveyed (Exh.11) and Terrace Falls Condominiums gave to American Savings and Loan a deed-in-lieu of foreclosure conveying the entire project to American and American took over the completion and operation of the project (Exh. 4).

9. These agreements called for the closing of the sale of the condominium unit to Margetts after it was ready for occupancy and certain specified finish items had been completed in the unit, which would be no later than June 30, 1985 (Exh.6, ¶6; Exh.7, ¶6).

10. American did not complete the unit by June 30, 1985 and did not finish the unit as required by the agreement (Exh.22, 24-27). Margetts paid $9,234.00 of his own money to partially finish the unit (R.465, p.3) and he was told by American's attorney to move into the unit on August 25, 1985 even though American did not have a certificate of occupancy and could not deliver title to Margetts (R.539, p.226-8).

11. After Margetts moved into the unit, American dismissed their security personnel on the project relying on Margetts' presence in the project as security for the whole project (R.539, p.233).

12. American did not form the owners association for the condominium project until September 1, 1987 and told Margetts not to pay any assessments, taxes, or rent on the unit (R.539, pp.233-235).

13. In reliance on the Twenty Percent Agreement signed as an inducement for Margetts to enter into the Condominium Purchase Agreement and other agreements, Margetts persuaded five of his acquaintances to buy condominium units in the project (R.539, p.230).

14. When American was finally prepared to close the transaction and convey title to Margetts, it refused to give him credit for 20% of the proceeds of units sold to purchasers obtained by Margetts or for the cost of finish items paid by Margetts. It also refused to allow him to select another unit as provided in the agreements.

15. On March 25, 1989, New West, as the successor-in-interest to American, caused a Notice to Quit to be mailed to Margetts demanding that he vacate the unit within five (5) days (R.538, p.178).

16. When Margetts did not vacate the unit, New West commenced this action for unlawful detainer (R.2-24) and Margetts filed a counterclaim asserting that he was entitled to a deed to the unit, that he was induced by fraud and deception to surrender his trust deed on the project and to pay an additional $134,283.00 for his unit and that he was entitled to a credit of $16,000.00 for finish items and further amounts for security services against the purchase price of his unit (R.27-51).

17. Fabian and Clendenin, the attorneys for New West in this matter, represented Margetts and his family and business interests for 29 years prior to the transactions involved in this case, including some counsel with respect to the transaction to exchange condominiums which led to this lawsuit (R.104-107).

SUMMARY OF ARGUMENT

I. NEW WEST'S ATTORNEYS SHOULD BE DISQUALIFIED.

The firm of attorneys representing New West represented Margetts for 29 years and advised him on matters which eventually gave rise to this suit.

There is an irrebuttable presumption that confidential information was disclosed. The Rules of Professional Conduct and other ethical standards require that New West's attorneys be disqualified. Enforcement of such Rules and standards after the fact is only effective if the judgment resulting from the improper representation is reversed.

II. ALL THE DOCUMENTS, INCLUDING THE TWENTY PERCENT AGREEMENT, WERE ONE TRANSACTION AND ONE AGREEMENT.

New West has based this action on documents which Margetts refused to sign until he was presented with the Twenty Percent Agreement as incentive and inducement to sign the others. They were all signed at the same time and as a part of the same transaction and must be construed together as one agreement. That means that New West is jointly bound with Terrace Falls to perform the promises made to Margetts in return for the release of his lien.

III. NEW WEST IS BOUND BY THE AGREEMENT OF TERRACE FALLS CONDOMINIUMS.

Besides being bound jointly with Terrace Falls to perform the promises made to Margetts, New West is also bound because those promises and representations were made by the agent of its predecessor, American Savings & Loan. That agent was placed in a position by American where Margetts was justified in assuming he was acting and speaking for American. That agent was the only person who dealt with Margetts and he was authorized by American to negotiate for it and to draft agreements for it. That

agent was also paid by American. American, and New West, have accepted the benefits obtained from Margetts and have ratified those acts and are estopped to deny their liability therefor.

IV. NEW WEST IS BOUND, AS THE SUCCESSOR-IN-INTEREST OF TERRACE FALLS, TO HONOR THE AGREEMENT WITH MARGETTS.

New West's predecessor purchased everything owned by Terrace Falls, leaving it with nothing. It purchased the name "Terrace Falls" and the business of selling condominiums. It agreed to pay any sums required to be paid to obtain the release from Margetts. It intentionally chose to step into American's shoes rather than foreclose and terminate Margetts' interest. It still does business as Terrace Falls Condominiums and is selling the units from which Margetts' unit was to be paid for. New West is obligated to perform the agreement with Margetts and honor the representations made to him by crediting him with twenty percent of the proceeds of the sale of other units.

V. MARGETTS IS ENTITLED TO RESCISSION OR DAMAGES.

The representations made to Margetts induced him to give up his lien on the property. Therefore, if he does not receive the credit towards the purchase of his unit, he is entitled to rescission and reinstatement of his lien or damages for his loss on the grounds of fraud, negligent misrepresentation, duress, mistake, unconscionability or unfair dealing.

VI. THE JUDGMENT FOR RENT HAS NO BASIS IN LAW OR FACT.

The judgment for rent of $17,100.00 was not based on any kind of agreement, express or implied. The elements of unjust enrichment were not pleaded nor proved. Both parties benefited from Margetts' occupancy of the unit, New West more than Margetts. Besides saving the cost of security personnel which were dismissed because of Margetts' presence, New West received the benefit of five sales of units, the buyers of which were referred by Margetts. It is not inequitable that Margetts retain any benefit he received.

VII. THE JUDGMENT FOR UNLAWFUL DETAINER HAS NO BASIS IN LAW OR FACT.

Strict compliance with the unlawful detainer statute is required in order to take advantage of the severe and summary remedies which it provides. New West failed to comply because there was no periodic tenancy and no conversion of that tenancy to a tenancy at will. The Notice to Quit was not served as required by the statute. New West also suffered no actual damages from Margetts' tenancy because Margetts' wife was not served and was entitled to remain in possession. Nominal damages are the most that could be awarded.

VIII. THE JUDGMENT FOR ATTORNEY'S FEES HAS NO BASIS IN LAW OR FACT.

There is no statute or agreement which provides for attorney's fees in this case. New West abandoned its claim under the purchase agreement and, therefore, cannot claim fees thereunder. The judgment was not based on the

agreement. There was also no evidence of or stipulation as to attorney's fees from which the court could make a determination of reasonableness.

IX. PREJUDGMENT INTEREST IS NOT ALLOWABLE.

The prejudgment interest was calculated on what the court found to be the fair rental value of the property. That finding is the province of the trier-of-fact from the testimony of experts and, therefore, could not have been determined at the time with mathematical certainty. Therefore, prejudgment interest may not be included in the judgment.

ARGUMENT

POINT I

NEW WEST'S ATTORNEYS, FABIAN AND CLENDENIN, SHOULD HAVE BEEN DISQUALIFIED BECAUSE OF THEIR FORMER REPRESENTATION OF MARGETTS AND HIS FAMILY AND BUSINESS ENTITIES.

Margetts, in his answer, raised the question of the conflict of interest presented by Fabian and Clendenin's representation of New West in this matter (R.31-2). Immediately thereafter, he filed a motion to disqualify them (R.97) supported by his affidavit (R.104-7) disclosing the fact that Fabian and Clendenin had performed work for and represented Margetts for 29 years for which he had paid them over $100,000.00 in legal fees. These services included numerous matters involving his business and personal matters, including setting up family trusts for his wife and children and advice on the

trade of his Park City Condominium for an interest in the Terrace Falls project involved in this case (R.105-107, ¶6). All of these matters were extracted from his diary. This representation only terminated because of a conflict of interest over some of these matters. Understandably, Margetts was incensed when "his" law firm filed this suit against him. Despite his objections, Fabian and Clendenin has persisted in its actions against him and refused to withdraw based on the argument that none of the present attorneys in the firm performed services for him.

Nevertheless, there is a larger principle involved. As stated in Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985), at 1204:

> Among the guidelines for professional conduct which we have approved is Canon 9, which states: "A lawyer should avoid even the appearance of professional impropriety." The basis of this tenet is that society's perception of the integrity of our legal system may be as important as the reality, since it is the perception that engenders public confidence that justice will be dispensed.

One can imagine the perception Margetts or anyone associated with him has of our legal system when the law firm, which represented him for 29 years and to whom he paid over $100,000.00, sued him and the court allowed him to do it. That perception goes far beyond Margetts and his associates and family as this matter has become public. The Rules of Professional Conduct are designed to prevent this but

> the Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The

> Rules simply provide a framework for the ethical practice of law. (Rules of Professional Conduct, Preamble, ¶2, under "Scope")

Yet, the Rules are fairly specific. Rule 1.9 of the Rules of Professional Conduct provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) Represent another person in the same or a substantially factually related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Rule 1.10 makes this Rule applicable to all lawyers in the firm when any one of them practicing alone would be prohibited from representing a client. Even the termination of a lawyer from the firm doesn't avoid the conflict in a matter that "is the same or substantially related" or if "any lawyer remaining in the firm has information" that is confidential or could be used to the client's disadvantage (Rule 1.10(c)).

In this case, members of the firm advised Margetts on the very transaction which eventually resulted in this lawsuit. That makes this a matter which "is the same or substantially related." In addition, members of the firm may have, or files of the firm may contain, information about the assets of Margetts that could assist them in collecting any judgment against Margetts. Use of that information would be "to the disadvantage of the former client."

The firm not only knows and has records of his business interests but also prepared trusts for his wife and children to which assets were transferred. Although it is not a part of the record in this case, it is interesting that this same firm has now filed an action against Margetts' wife to recover from her the judgment entered in this case. How can it be known that that action was not taken as a result of knowledge concerning assets that were transferred to her pursuant to the estate planning done by members of the firm? No such accusation is being made but such a possibility exists and what does that do to "the appearance of professional impropriety"?

Cases under Rule 1.9 of the Rules of Professional Conduct and its predecessors hold that

> the communication of confidential information is presumed once a showing is made that the matter in which an attorney formerly provided representation is substantially related to matters in the pending action.
>
> . . . .
>
> The majority rule is that the presumption of disclosure is not rebuttable when the interests of the previous client are adverse to a client whom the attorney now is representing. Carlson v. Langdon, 751 P.2d 344 (Wyo. 1988) [a case in which the alleged but denied representation of the former client took place twelve years previously and involved documents now in litigation].
>
> The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. I will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the

rule relating to privileged communications be maintained. (T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268-9 (S.D.N.Y. 1953).

The attorneys in those cases, as well as in Margulies v. Upchurch, supra, were disqualified. New West's attorneys in this case should also have been disqualified. The lower court's refusal to do so should be reversed and the entire judgment resulting from the inappropriate representation should be overturned.

POINT II

THE TWENTY PERCENT AGREEMENT WAS A PART OF MARGETTS' AGREEMENT TO PURCHASE A CONDOMINIUM AND TO RELEASE HIS TRUST DEED AND MUST BE CONSTRUED AS AN ESSENTIAL PART OF THAT TOTAL AGREEMENT.

It is clear from the testimony of Margetts and Mr. Snow that Margetts would not have signed the Condominium Purchase Agreement, Settlement Agreement, General Release and Request for Reconveyance if the Twenty Percent Agreement were not part of the total agreement. He had already refused to sign those other agreements several times including on the morning of November 14, 1984 when he met with Mr. Snow. On that occasion, Mr. Snow told him to come back later that day because "maybe there's a way that we can get you Condominium 413" (R.539, p.211). When Margetts returned Mr. Snow presented him with the Twenty Percent Agreement as an "incentive" (R.539, p.211) and explained to him that "they

only have to sell seven condominiums and your condominium will be paid for" (R.539, p.212) and that Margetts would get what he wanted by such an agreement (R.539, p.213). Margetts was clearly induced to sign the other documents by the presentation of the Twenty Percent Agreement and would not have signed those documents without it (R.538, p.130, R.539, p.219). Mr. Snow even wrote on the Twenty Percent Agreement that the others would not be delivered unless the Twenty Percent Agreement was signed and delivered simultaneously (Exh.16, R.538, p.134).

Under these circumstances the principle set forth in Bullfrog Marina Inc. v. Lentz, 28 U. 2d 261, 501 P.2d 266, 270-271 (1972) applies:

> "[T]he trial court found that after full consideration of the entire transaction, including the purpose to be served by the lease and the employment contract, defendant would not have leased the boats to plaintiff, unless he could operate the houseboat rental service. The trial court concluded that the lease and employment contract bore a relationship to one another and should be considered as one agreement . . . . [W]here two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so far as determining the respective rights and interests of the parties although they do not in terms refer to each other."

See also Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357 (Utah 1987); Atlas Corp. v.. Clovis National Bank, 737 P.2d 225 (Utah 1987); First Security Bank v. Maxwell, 659 P.2d 1078 (Utah 1983). Likewise the agreements to purchase the condominium and to release the trust deed would not have been signed without the Twenty Percent Agreement. They should be considered as one agreement.

POINT III

NEW WEST IS BOUND BY THE TWENTY PERCENT AGREEMENT BECAUSE OF THE ACTS AND REPRESENTATIONS OF THE ATTORNEY WHO HAD ACTUAL OR APPARENT AUTHORITY TO ACT FOR ITS PREDECESSOR AND BECAUSE IT HAS RATIFIED THE AGREEMENT AND IS ESTOPPED TO DENY THE AGREEMENT BY ITS ACCEPTANCE OF THE BENEFITS THEREOF.

New West, of course, contends that it is not bound by the Twenty Percent Agreement because it was not signed by American Savings even though it has accepted and had the benefit of the consideration given by Margetts for that agreement. Margetts, of course, only knew what Mr. Snow was telling him so the question is whether he was justified in relying upon Mr. Snow. From the very beginning of these negotiations with American Savings Mr. Snow was its spokesman. At the first meeting with a representative of American it was Mr. Snow who did most of the talking (R.539, p.264), and it was Mr. Snow who made the offer to Margetts (R.539, p.265). It was clear that the offer was being made by American and that any deal would have to be made with American. It would be paying the money or conveying the unit being offered. After that meeting it was Mr. Snow who called to increase the offer and it was Mr. Snow who had all further contact with Margetts or his attorney right up to the signing of all of the documents by Margetts. It was Mr. Snow who drafted the documents presented to Margetts and who revised those documents at the request of Margetts. There was no question in

Margetts' mind that Mr. Snow was speaking for and representing American. This was especially true when Mr. Snow told him "they only have to sell seven condominiums and your condominium will be paid for" (R.539, p.212), that he would get what he wanted by such an agreement (R.539, p.213) and American doesn't need to sign the agreement because "with the deed-in-lieu of foreclosure, they will be Terrace Falls Condominiums" (R.539, p.214). What else could Margetts believe but that he represented and was speaking for American?

By allowing Mr. Snow to speak for them, American placed Mr. Snow in a position of apparent, if not actual, authority to bind it. Mr. Lee Stevens, American's representative, appeared with Mr. Snow and allowed him to speak for him and to make and increase American's offer. American approved all changes in the agreements and paid Mr. Snow's fees incurred in dealing with Margetts and others. These facts clearly establish Mr. Snow as an agent with authority to act for American.

The principle of agency that governs here was stated in Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 666 P.2d 711 (1983), in which the court answered a question certified to it by a federal court as to when a corporation is liable for punitive damages for the wrongful acts of its agent. As a preliminary matter the court set forth these two well-established legal principles, at 713:

> First, a corporation is liable for the torts of its agent when committed within the scope of the agent's authority and course of employment even though it did not authorize or ratify the tortious acts Russell v. American Rock Crusher Co., 181 Kan. 891, 894, 317 P.2d 847 (1957). A related rule of law states a principal is responsible for the torts of its agent where the

> tortious acts are incidental to and in furtherance of the principal's business, even though outside the scope of the agent's authority. Williams v. Community Drive-In Theater, Inc., 214 Kan. 359, 520 P.2d 1296 (1974).

If those principles apply to the wrongful acts of the agent, they also apply to acts which are not wrongful but are performed to carry out the purposes of the corporation, as was the case here. See Ficke v. Alaska Airlines, Inc., 524 P.2d 271 (Alaska, 1974), where the court held that an attorney retained to negotiate the terms of an agreement binds his client to promises made within the scope of that authority although not authorized. And, even though New West now claims Mr.Snow had no authority to act for its predecessor, he was clearly authorized by American to prepare and obtain the signature of Margetts on the settlement agreements and it is bound by the acts of Mr. Snow which are "incidental to and in furtherance of" that object "even though outside the scope of" his authority.

This principle has also been held to apply to the acts of an attorney who did not actually represent the party bound by those acts. In Arizona Title Ins. and Trust Co. v. Pace, 8 Ariz. App. 269, 445 P.2d 471 (1968), a title insurance company retained an attorney to defend its insured on a claim on which it had denied coverage. The attorney settled the claim for $4,750.00 which the insured paid. The insured then sued the title insurance company to recover the amount paid to settle. The question presented to the court was whether the insurance company was bound by the settlement entered into by the insured's attorney, who was hired and paid by the insurer. The court held, at 473-4:

> However, if the client places the attorney in a position where third persons of ordinary prudence and discretion would be justified in assuming the attorney was acting within his authority, then the client is bound by the acts of the attorney within the scope of his apparent authority . . . .
>
> . . . . The appellant retained an attorney who, although named as an attorney of record for the defendants-insured, was primarily involved in the litigation to protect the interests of the insurer. The attorney regularly advised the insurer, through its managing agent, of the progress of the litigation. The insurer was fully aware of the fact that the appellees construed Ellis's representation of them to be nominal only and that Ellis was acting for the insurer. Therefore, when Ellis advised compromise of the Bailey's claim and volunteered to effect it on behalf of the appellees, they were justified in assuming that he had authority to do so. Under such circumstances, appellant is estopped to assert otherwise and is thereby bound by the act of its attorney.

Here we have a similar situation where Mr. Snow nominally represented Terrace Falls but was paid by, gave advice to and took direction from American. The only difference was that Margetts was on the other side of the matter and would be less likely to know of any lack of authority of Mr. Snow to act for American. Our case is, therefore, a stronger one for holding that Mr. Snow had apparent authority to act for American and that Margetts was justified in assuming he had authority.

Utah cases also hold that a party, including the State, is bound by the acts of attorneys which it places in a position where others will rely on those acts. Gorgoza, Inc. v. Utah State Road Commission, 553 P.2d 413 (1976), held that the State was bound by an agreement entered into by its attorney

which obligated the State to provide access to property which the State had not authorized. The court went on, at 415, to point out that the State

> proceeded to act pursuant to the agreement and in accordance with the benefit it received therefrom, so there is at least some plausibility to the idea that is should be deemed to have ratified and/or to be estopped from repudiating that contract.

In a suit brought by the payee of a usurious promissory note against both the makers of the note and the attorney who was retained by the makers to draft the note, the court in Silver v. George, 618 P.2d 1157 (Haw. App. 1980), held the makers and the attorney liable for the damage caused in these words, at 1159:

> We hold that it is a per se violation of an attorney's duty for him to draw a note, which is on its face usurious, that that duty runs at least to the named parties to the note, including the payee, even though the payee did not hire him or pay his fee; that the attorney is the agent for his clients in drawing the note; and that his clients should not be permitted to be unjustly enriched at the expense of the payee when the attorney draws a note which violates the law and thus confers a benefit upon his client at the expense of the relying and innocent payee.

While the terms of the agreements themselves, in our case, did not violate the law, Margetts innocently relied upon the attorney hired by American to draft those agreements and it should not be permitted to be unjustly enriched at the expense of Margetts by taking advantage of the benefit conferred upon it by the actions and representations of that attorney.

That American was directly involved in the whole process through Mr. Snow and was well aware of the benefit it was to receive from the transaction with Margetts is clear from the testimony of Mr. Snow. He testified as follows:

> If it wasn't satisfactory to American, then the deal wouldn't go through; so I had to run the documents past American. (R.538, p.83)
>
> . . . .
>
> And then, in my sending documents back and forth to Roulhac Garn, it was clarified what documents were needed and what the form of those documents would have to be.
>
> Q. But, did you talk to Roulhac Garn about that?
>
> A. Yes.
>
> Q. And did she indicate they were mandatory, that those documents be signed by Jack Margetts?
>
> A. She indicated that it was mandatory that Jack Margetts, along with all the other lienholders, reconvey their interest in the project. (R.538, pp.102-3)
>
> . . . .
>
> Q. That intent was communicated to you by someone at American?
>
> A. Yes. (R.538, p.113)
>
> . . . .
>
> . . . did American at any time inform you that they were willing to pay your fee in part because the work that you were doing was of substantial benefit to American?
>
> A. Yes. (R.5, p.117)

. . . .

Q. So, when you drafted it, revised it, prepared it, negotiated about it [referring to Exhibit 7], that was solely for American Savings, is that correct?

A. Yes. (R.538, p.123)

. . . .

Question: [Referring to the Twenty Percent Agreement] After preparing this, did you discuss this agreement with American?

Answer: Probably.

A. Yes. As far as it goes in context, yes.

Q. Is that what you said?

A. Yes. (R.538, p.133)

Even Roulhac Garn, the San Francisco attorney for American, who disingenuously denied that Mr. Snow was American's Salt Lake attorney, admitted the benefit to American of Mr. Snow's work. Her testimony was:

Q. *Did it prove, also, of value to American Savings?*

A. I don't know. The transaction wouldn't have closed without these agreements.

Q. It was vital then, was it not, that all of these documents be signed?

A. Yes.

Q. And they were all required by the deed-in-lieu agreement that you prepared?

A. Yes. (R.539, p.311)

American wanted to obtain a deed-in-lieu of foreclosure and a release of all liens against the property. It paid Mr. Snow to accomplish that. Mr. Snow succeeded in accomplishing that only by making representations to Margetts which induced him to sign the agreements and release his lien against the property. American received the benefit of that release. New West, as American's successor, has accepted that benefit but now refuses to recognize the representations made by the agent who obtained that benefit. If the principles of actual or apparent authority do not bind New West to those representations, then the principles of ratification and estoppel by acceptance of the benefits obtained by those representations do bind New West.

POINT IV

NEW WEST, AS THE SUCCESSOR-IN-INTEREST TO TERRACE FALLS BY DEED WITHOUT A FORECLOSURE AND BY ITS PREDECESSOR'S CONTRACT WITH TERRACE FALLS, IS BOUND BY THE AGREEMENT OF TERRACE FALLS WITH MARGETTS TO GIVE HIM CREDIT AGAINST THE PRICE FOR HIS CONDOMINIUM FOR SALES OF OTHER CONDOMINIUMS IN THE PROJECT.

New West has suggested that the purpose of the Twenty Percent Agreement was to allow Margetts to participate in any windfall or kickback

that might be paid to Terrace Falls after the deed-in-lieu to American. This suggestion makes no sense since Terrace Falls was conveying its entire interest in the project and retained no rights to receive anything back from American. And, of course, anything that went to Terrace Falls in the form of a kickback would not be made known to Margetts. There was no reason for him to expect anything from Terrace Falls. The Twenty Percent Agreement was totally valueless if the credit to Margetts under the Agreement was to come from Terrace Falls, the partnership which owned the project prior to its conveyance to American. It would not be selling any condominium units nor would it receive anything from the sale of condominium units. If that were the purpose of the Twenty Percent Agreement it would be totally illusory and Margetts surely would not have released his lien and signed the other agreements in return for such an illusory expectation. Nor would American expect him to do so, knowing of his refusal for two months to accept what they had already proposed. In other words, it was totally unreasonable for both parties to interpret the Twenty Percent Agreement to give Margetts a percentage of what Terrace Falls might get in the future, which everybody knew would be nothing. Margetts would not give up his bargaining position for nothing and American knew he would not.

Furthermore, why would the assignment to Margetts be limited to $134,283.00, the price to be paid by Margetts under the Condominium Purchase Agreement with American (Exh.7), if that agreement was not part of the whole transaction with American. There would be no reason to limit his participation with Terrace Falls to that figure.

Therefore, the only interpretation of the Twenty Percent Agreement that makes any sense is that it was American who was agreeing to credit Margetts, up to $134,283.00, the stated purchase price of his unit, for 20% of "any proceeds from the sale of the Project or of any unit or interest therein" (Exhs. 10 and 16). For this reason Margetts' testimony as to what Mr. Snow told him about the agreement is entirely credible and the only version of the conversation that is credible:

> Q. After Mr. Snow had presented you with the 20-Percent Agreement, Exhibit 16, did he say anything to you?
>
> A. Yes. He said, "Do you realize that they only have to sell seven condominiums and your condominium will be paid for?"
>
> . . . .
>
> Q. . . . . Did you make any response to that?
>
> A. He made an explanation that I would get what I wanted by such an agreement.
>
> Q. Did you ask him anything about that agreement, yourself?
>
> A. Yes. I asked him why American Savings wasn't signing it.
>
> Q. Did he respond?
>
> A. Yes. He said, "They didn't need to." He said, "With the deed-in-lieu of foreclosure, they will be Terrace Falls Condominiums."
>
> Q. Now, did you believe what he told you?
>
> A. Absolutely.
>
> Q. And did you rely on it?

A. I relied on it. (R.239, pp.212-4)

That is the only interpretation of this agreement that makes any sense. American took advantage of that interpretation when it encouraged Margetts to find buyers of condominiums in the project and actually sold five condominiums as a result of that. (R.539, p.230)

As the successor-in-interest to Terrace Falls, American became Terrace Falls Condominiums and is still operating the project under that name. In fact, the Real Property Purchase Agreement between Terrace Falls and American (Exhibit 4, ¶2.B) contains an assignment of the business of selling condominium units and of the name "Terrace Falls" from Terrace Falls to American. Thus, American stepped into the shoes of Terrace Falls and took over the obligation to complete the project and to pay the bills incurred in owning and operating the project. It inherited the burdens as well as the benefits of the project including the obligation to credit Margetts for 20% of the proceeds of sales in the project. Even if the agreement is considered to have been made by Terrace Falls, American, as the purchaser of the project from Terrace Falls, with knowledge of the obligation to Margetts through its actual or apparent agent, is obligated to Margetts as a third party beneficiary. Mullins v. Evans, 560 P.2d 1116 (Utah 1977).

This transaction was, in fact, a bulk sale of Terrace Falls inventory of condominium units to American without compliance with the bulk sales provisions of the Uniform Commercial Code, §§70A-6-101, et seq. That failure makes the buyer, American and its successor, New West, liable for any obligation not taken care of in the sales transaction itself. The purpose of

those provisions is to make sure that all outstanding obligations are paid or provided for in the sale of the assets from which claimants would otherwise be paid. American and Terrace Falls did attempt to provide for the payment of such obligations in their Real Property Purchase Agreement (Exhibit 4, ¶4.E.) wherein they agreed to cooperate in obtaining the release of liens and American agreed to pay all sums required to be paid in connection with the obtaining of such releases. Thus, by its own contract, American agreed to pay what was required to obtain a release from Margetts and, further, became obligated to satisfy any claims of Margetts against Terrace Falls as the successor-in-interest to Terrace Falls and the beneficiary of the release given up by Margetts in return for the promise of Terrace Falls. New West has now stepped into the shoes of American and is likewise bound to honor the commitments made to Margetts.

POINT V

MARGETTS WAS INDUCED TO ENTER INTO THE AGREEMENTS WITH AMERICAN AND TO RELEASE HIS LIEN BY IMPROPER CONDUCT, WHETHER TERMED FRAUD, DURESS, COERCION, MISTAKE, NEGLIGENT MISREPRESENTATION, UNCONSCIONABILITY, OR UNFAIR DEALING AND IS ENTITLED TO RESCISSION OR DAMAGES.

The facts recited above clearly demonstrate that Margetts was induced to sign the agreements and release his lien because of the representations made to him by Mr. Snow. He would not have done so except for those representations which turned out to be false. All of the elements of fraud are

present including false, material representations made knowingly or recklessly, justifiable reliance, inducement and damage. Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952). The elements of negligent misrepresentation are also present, including pecuniary interest in the transaction, superior position to know the facts, careless or negligent false representation expecting reliance and reasonable reliance and damage. Christenson v. Com. Land Title Co., 666 P.2d 302 (Utah 1983). Duress and coercion are also present. Reliable Furniture Co. v. Fidelity & Guar. Ins., 16 U.2d 211, 398 P.2d 685 (1965). Since Margetts perception of the agreement was an essential element of the contract and it is unconscionable to enforce the contract against him without honoring what he thought he was getting, unilateral mistake also provides grounds for relief. John Call Engineering v. Manti City Corp., 743 P.2d 1205 (Utah 1987); B & A Associates v. L. A. Young Sons Const. Co., 796 P.2d 692 (Utah 1990). Because Margetts gave up his entire interest in the project in return for what was an illusory promise, the agreement is unconscionable and should be rescinded or reformed. Resource Management Co. v. Western Ranch & Livestock Co., Inc., 706 P.2d 1028 (Utah 1985); Bekins Bar V Ranch v. Huth, 664 P.2d 445 (Utah 1983).

Any one or all of these principles have application in this case and entitle Margetts to rescission of the transaction and reinstatement of his lien or, in the alternative, to damages for what he has lost as a result. What he has lost could just as easily be compensated by enforcement of the Twenty Percent Agreement. In any event the judgment against him in this case cannot be justified in light of the unfair dealing that has occurred in this matter.

POINT VI

THE JUDGMENT AGAINST MARGETTS FOR THE FAIR RENTAL VALUE OF THE UNIT IN THE AMOUNT OF $17,100 WAS UNSUPPORTED BY FINDINGS OF FACT AND IS CONTRARY TO LAW.

The court entered judgment against Margetts for rent for nineteen months based on what the court determined the fair rental value to be. This judgment was obviously not based on any rental agreement between Margetts and New West. In fact, the court found that no such agreement existed (R.515, ¶16). The evidence fully supports this since Roulhac Garn did not prepare an occupancy agreement for Margetts (R.539, p.305) and since no one ever asked Margetts to pay any homeowners' fees or rent (R.539, p.235) and in fact refused his offer to pay homeowners' fees (R.539, p.233). How can the court conclude that Margetts owes rent without an agreement to pay rent? There must be a factual and legal basis for such a conclusion.

The only possible legal basis for such a conclusion would be unjust enrichment, which requires that (1) a benefit be conferred on one person by another, (2) an appreciation or knowledge by the conferee of the benefit, and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. Concrete Products Co. v. Salt Lake County, 734 P.2d 910 (Utah 1987); Berrett v. Stevens, 690 P.2d 553 (Utah 1984). There was no unjust enrichment in those cases even though a benefit was conferred on one party. In our case there are not facts to establish these

essential elements. The court actually found that both parties benefited from Margetts' occupancy (R.515, ¶16). American dismissed its security personnel because of Margetts' presence on the project and, in addition, several sales of units were made as a direct result of his presence there (R.515, ¶¶18 and 19; R.539, p.230). That represents a substantial benefit to American which would exceed any rental value of the unit and, in light of that, it cannot be concluded that it would be inequitable for Margetts to retain any benefit he may have received. The court, of course, made no such finding. Furthermore New West lost no revenue because of Margetts' occupancy since only three units in the entire project were rented out. (R.538, p.151, 161-2) The rest of the complex was essentially vacant. There is no basis for unjust enrichment.

There is no factual or legal basis for the judgment for the rental value of the unit and it must be reversed.

POINT VII

THE JUDGMENT FOR UNLAWFUL DETAINER FOR $21,600 IS NOT SUPPORTED BY THE FACTS NOR THE LAW AND MUST BE REVERSED.

The basis for the claim of unlawful detainer was the Notice to Quit on March 25, 1989. The section of the Unlawful Detainer Statute relied upon by New West as the basis for this claim is §78-36-3. The only provision that could apply to this case is §78-36-3 (1)(b)(ii) which provides:

> (1) A tenant of real property, for a term less than life, is guilty of an unlawful detainer.
>
> ....

(b) when, having leased real property for an indefinite term with monthly or other periodic rent reserved:

. . . .

(ii) in cases of tenancies at will, where he remains in possession of the premises after the expiration of a notice of not less than five days;

To come within this provision the tenant must have leased the property "for an indefinite term with monthly or other periodic rent reserved." The next subparagraph does not apply unless the property is leased with periodic rent reserved and then the tenancy is converted to a tenancy-at-will. That was not the case here. There was no lease and no rent of any kind reserved. New West's claim for rent before the Notice to Quit and of a tenancy at will after is inconsistent. If there was a rental arrangement before, that would first have to be terminated to make Margetts a tenant-at-will. Therefore, there was no basis for unlawful detainer.

As stated in Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1952), "unlawful detainer, being a summary procedure, the statute must be strictly complied with in order to enforce the obligations imposed by it." New West has not complied with the requirements of §78-36-3 in order to place Margetts in unlawful detainer of the condominium unit. Furthermore, it has not complied with §78-36-6 which provides:

The notices required by the preceding sections may be served:

(1) by delivering a copy to the tenant personally;

(2) by sending a copy through registered or certified mail addressed to the tenant at his place of residence;

(3) if he is absent from his place of residence or from his usual place of business, by leaving a copy with a person of suitable age and discretion at either place and mailing a copy to

the tenant at the address of his place of residence or place of business; or

(4) if a person of suitable age or discretion cannot be found at the place of residence, then by affixing a copy in a conspicuous place on the leased property.

The evidence in this case indicates that the Notice to Quit was mailed to Margetts (R.538, p.177-8) but there is no evidence that it was sent by registered or certified mail as required by the statute. The burden of proof is on New West to show its total compliance with the statute. Without proof of service by one of the four methods allowed by the statute, the unlawful retainer remedy is not available to New West. Carstensen v. Hansen, 107 Utah 234, 152 P.2d 954 (1944).

There is a further reason why the judgment for unlawful detainer cannot be supported. The Notice to Quit in this case, if served at all, was served only on Margetts and not on his wife, who resided in the condominium with him during the alleged unlawful detainer period. Therefore, even if Margetts had moved from the condominium, New West would have had no right to possession as against his wife. It, therefore, suffered no actual damage. In such a case, Perkins v. Spencer, supra at 449, held that "nominal damages to vindicate their right to possession against her [him in this case] is all that could properly be awarded."

The severe remedy of the unlawful detainer statute requires strict compliance with all of its terms before judgment thereunder is appropriate. American Holding Co. v. Hanson, 23 U.2d 432, 464 P.2d 592 (1970); Van Zyverden v. Farrar, 15 U.2d 367, 393 P.2d 468 (1964). New West has not complied and is, therefore, not entitled to a judgment for unlawful detainer. At

most, it would be entitled to nominal damages. The judgment for $21,600.00 must be reversed.

POINT VIII

THE JUDGMENT FOR ATTORNEY'S FEES MUST BE OVERTURNED BECAUSE IT IS NOT BASED ON ANY STATUTE OR AGREEMENT.

Any award of attorney's fees must be based on either a statute or an agreement which authorizes such fees. Not even a stipulation will support such an award. Mecham v. Benson, 590 P.2d 304 (Utah 1979). The only statute involved in this case is the Unlawful Detainer Statute which provides, in §78-36-10(3), U.C.A., for the award of attorney's fees only "if they are provided for in the lease or agreement." The "lease or agreement" is defined under §78-36-10(1) as "the lease or agreement under which the property is held." In this case there is no lease or agreement under which the property was held. New West's own attorney admitted that she prepared no occupancy agreement (R.539, p.305).

New West has asserted that the Condominium Purchase Agreement (Exh.7, ¶20) provides for attorney's fees in this case. In the first place that agreement only provides for fees in a dispute arising "under this Agreement," which is not the agreement under which Margetts held the property. In the second place, New West did not obtain a judgment based on a claim or dispute under that agreement. In fact, it abandoned its claim under that agreement when it sought a judgment only for Margetts' occupancy of the property. When objection was made to evidence as to rental value because

of the claim to enforce the agreement, New West's attorney stated, "We are not seeking $134,000.00. That would amount to specific performance" (R.538, p.154), thus electing to forego the claim under the purchase agreement and electing to pursue only a claim for occupancy. He confirmed this in his closing argument when he said, "the primary relief that we seek is... restitution or possession of the unit" (R.539, p.334) and "we have elected to merely--to proceed merely on a theory of the fair rental value of the property" (R.539, p.335). Consistent with that position, the lower court only awarded judgment based on Margetts' occupancy of the property.

Utah cases have held that one cannot recover attorney's fees under an agreement which he has rescinded. One may not "avoid the contract and, at the same time, claim the benefit of the provision for attorney's fees." BLT Investment Co. v. Snow, 586 P.2d 456, at 458 (Utah 1978). The abandonment of the claim under the agreement is an avoidance of the agreement. Similarly, in Cluff v. Culmer, 556 P.2d 498 (Utah 1976), it was held, at 499:

> However, this court has numerous times said that such a provision for attorney's fees makes them allowable only for enforcement of the covenants in the contract. Therefore, it does not extend to implied covenants or obligations not expressly included therein. It follows that the trial court correctly ruled that attorney's fees claimed by the plaintiffs are not allowable.

Since New West was not enforcing any covenant in the purchase agreement, it cannot rely on the attorney's fee provision of that agreement. There is, therefore, no basis for the award of attorney's fees.

Furthermore, Cluff v. Culmer, supra at 499, went on to state:

> When attorney's fees are properly awardable, they must be proved as any other damages: either by stipulation that the court may determine them from his own knowledge and experience, or there must be evidence upon which to base a finding as to their necessity and reasonableness."

There is neither a stipulation nor evidence in this case from which a finding of necessity and reasonableness can be made. That is a further ground upon which the award of attorney's fees must be overturned.

POINT IX

THE AWARD OF PREJUDGMENT INTEREST WAS CONTRARY TO LAW SINCE THE DAMAGES COULD NOT BE CALCULATED PRECISELY AND WERE FOR THE TRIER-OF-FACT TO DETERMINE.

Prejudgment interest is allowable, according to Price-Orem Inv. Co. v. Rollins, Brown and Gunnell, 784 P.2d 475, at 483 (Utah App. 1989), only when the damages can be calculated with mathematical certainty

> "in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment" . . . .
>
> On the other hand, interest cannot be allowed in cases "where damages are incomplete and are peculiarly within the province of the jury to assess at the time of trial" . . . . In particular, damages ascertained by determining the fair market value of real property before and after the damage "cannot be determined with mathematical precision [and] may be inherently uncertain."

The determination of the rental value of real property is in the same category since that is in the province of the trier-of-fact to be determined from the testimony of experts. Therefore, as in Price-Orem, supra, prejudgment interest cannot be awarded. That portion of the judgment, too, must be overturned.

CONCLUSION

The violation of the Rules of Professional Conduct and of the guidelines approved by the Supreme Court to preserve the integrity of the legal system require that New West's attorneys be disqualified. This case arises out of the same transaction upon which Margetts was advised by those attorneys and there is an irrebuttable presumption that confidential information was communicated to them. The only effective way to enforce the Rules and guidelines is to overturn the judgment resulting from the improper representation in this case.

The judgment must, nevertheless, be overturned because of errors made with respect to the merits of the case. The Twenty Percent Agreement cannot be considered separate and apart from the other agreements signed by Margetts. He would not have signed them without the Twenty Percent Agreement and it was agreed to, with the others, at the same time and as a part of the same transaction. It was, in fact, the incentive or inducement for the signing of the others. It is, therefore, required that they all be upheld, or rescinded, together and that Margetts' lien be reinstated or that he be given credit against the price of his unit for twenty percent of the proceeds of sales of other units. Since all of the documents constitute one transaction, Margetts

is on one side of the transaction and New West and Terrace Falls stand together on the other side, each of them bound by the promises of the other, both having received and accepted the benefits of Margetts' agreement.

Beyond the fact that New West's predecessor and Terrace Falls were joint parties on the other side of the total agreement, New West is bound by the acts and representations of Mr. Snow who had either actual or apparent authority to bind its predecessor. American dealt directly with Mr. Snow, gave him directions, accepted advice from him, instructed him to draft the documents, authorized him to negotiate for it and paid his fees for all of this. That is actual authority and American is bound by all acts within the scope of that authority or the course of that employment even if it did not authorize all of the specific acts. It further placed Mr. Snow in a position where Margetts justifiably assumed he was authorized to act for it. Mr. Snow was the spokesman for Lee Stevens, the acknowledged representative of American, from the very first meeting. Mr. Snow was the only person with whom Margetts dealt from beginning to end. He, at least, had apparent authority to bind American. Furthermore, American and New West had no qualms about accepting the benefits of the agreement with Margetts. It received what it set out to obtain from Margetts and kept that with no concern that Margetts didn't receive what he was promised in return. That constitutes ratification and estops it from denying Margetts the benefit he was to receive.

A third reason requires that New West be bound by the promises and representations made to Margetts. It has received from Terrace Falls a conveyance of the whole project, including the name "Terrace Falls" and the business of selling of condominium units and all other tangible and intangible

assets of the project. Terrace Falls is left with nothing (except a release of liability) and New West has everything (including liability for any obligations of Terrace Falls). As the successor-in-interest to Terrace Falls, New West became Terrace Falls and still continues to operate as Terrace Falls Condominiums. It is, therefore, responsible for the obligations of Terrace Falls, especially those incurred in obtaining the releases required to complete the transfer.

The facts of this case constitute fraud, duress, mistake, negligent misrepresentation, unconscionability and unfair dealing which entitle Margetts to rescission and return to the status quo ante or to damages for the loss to him. Because of this, the judgment against him must be reversed and a judgment entered in his favor.

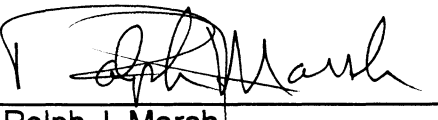
Furthermore, the judgment for rent, prejudgment interest, unlawful detainer and attorney's fees is not supported by the facts or the law. The judgment for rent has no basis in any rental agreement of any kind and the essential elements of unjust enrichment are not present. Both parties received a benefit with American receiving the greater benefit. It is, therefore, not inequitable that Margetts retain whatever benefit he received. The prejudgment interest is also not allowable since the determination of the fair rental value of the property is the province of the trier-of-fact from the testimony of expert witnesses and could not have been calculated at the time with mathematical certainty. The judgment for unlawful detainer must also be reversed because the strict requirements of the Unlawful Detainer Statute have not been met. There was no lease of the property or conversion to a tenancy-at-will. The Notice to Quit was not served as required by the statute.

And, no actual damages were suffered because Margetts' wife was entitled to remain in possession even if Margetts had moved from the property. No more than nominal damages can be awarded. Finally, the judgment for attorney's fees is not based on any statute, agreement, evidence, or stipulation and, therefore, must also be overturned.

The entire judgment in this case should be reversed and the case remanded with instructions to enter judgment in favor of Margetts either rescinding the transaction and reinstating his lien or awarding him ownership and possession of the condominium, or damages in lieu thereof, and his costs and attorney's fees incurred herein.

Respectfully submitted,

BACKMAN, CLARK & MARSH

By 

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CERTIFICATE OF HAND-DELIVERY

THIS IS TO CERTIFY that four (4) true and correct copies of the foregoing **Appellant's Brief** was hand-delivered on the 22nd day of January, 1991, to the following:

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